88-900

NO._____

FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CHARLES A. KERR II,

Petitioner

vs.

SECRETARY, HEALTH AND HUMAN SERVICES

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES A. KERR II
10514 24th Drive, S.E.
Everett, Washington 98208
(206) 337-9424
Pro se

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit wrongfully denied petitioner's right to due process under the Fifth Amendment to the Constitution of the United States when it sustained the action of the court lower and that of the Secretary, Health and Human Services after the Secretary declared: "The law and regulations do not provide a basis for Social Security to cite another Federal Agency for its actions."? There being no such laws or regulations. And, does this departure from the accepted and usual course of judicial proceedings abuse Ninth Circuit discretionary powers as to call for an exercise of this Court's power of supervision?

2. Whether the United States Court of Appeals for the Ninth Circuit erroneously ignored its own and other Federal Appellate courts precedent setting case law regarding equitable estoppel thereby being in serious conflict with this Court, other courts and itself in deciding petitioner's petition for appellate review?

3. Whether the Secretary, Health and Human Services shall direct the Social Security administration to calculate petitioner's retirement insurance benefits to commence January, 1983, the month and year of

petitioner's 62nd birthday, make the necessary adjustments in petitioner's account and provide the Office of Personnel Management with the information necessary to carry out the provisions of Public Law 97-253, as though both agencies had complied in timely fashion with the intent of the Congress from the date of enactment of Public Law 97-253 (5 U.S.C. Section 8332)?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CHARLES A. KERR II, Petitioner

vs.

SECRETARY, HEALTH AND HUMAN SERVICES, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Charles A. Kerr II, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 19, 1988.

OPINIONS BELOW

The conclusion of the Appeals Council in refusing to consider petitioner's request to review the action of the administrative law judge is found in the Court Transcript

of the Record at pages 2 and 3. It is reprinted as Appendix A.

The order and judgment of the United States District Court for the Western District of Washington affirming the conclusion of the Appeals Council has not been reported. It is reprinted as Appendix B.

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit affirming District Court has not been reported. It is reprinted as Appendix C.

The Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and rejecting suggestion for an in banc hearing is reprinted as Appendix D.

The final mandate of the United States Court of Appeals for the Ninth Circuit is reprinted as Appendix E.

JURISDICTION

The order and judgment of the United States District Court for the Western District of Washington was entered on May 20, 1987, affirming respondent's denial of petitioner's claim for retirement insurance benefits as provided by Public Law 97-253.

The United States Court of Appeals for the Ninth Circuit affirmed the finding of the court lower on July 21, 1988.

Ninth Circuit denied petitioner's petition for rehearing and petitioner's suggestion for rehearing in banc was rejected on September 8, 1988.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1).

PROVISIONS OF LAW INVOLVED

United States Constitution - Amendment 5 —

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Federal Rules of Evidence, Rule 101

"The rules govern proceedings, in the courts, of the United States and before United States magistrates to the extent and with the exceptions stated in Rule 1101."

Federal Rules of Evidence, Rule 401

"Relevant evidence" means evidence having any tendency to make the evidence of any fact that is of consequence to the determination of action more

probable or less probable than it would be without the evidence."

Federal Rules of Evidence, Rule 402

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

Federal Rules of Evidence, Rule 403

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Public Law 97-253, Section 307 (codefied as 5 U.S.C. Section 8332)

Reprinted as Appendix F

28 U.S.C. Section 1291 - Final decisions of district courts

"The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United

States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be held in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and 1295 of this title."

STATEMENT OF THE CASE

The jurisdiction of the United States Appellate Court for the Ninth Circuit was invoked under 42 U.S.C. Section 405(g) and docketed as Number 86-7147. Upon respondent's motion to dismiss for lack of jurisdiction, the Court, on its own motion, transferred all records in the case to the United States District Court for the Western District of Washington (28 U.S.C. Section 1631).

The jurisdiction of the District Court was invoked under Section 205(g) of the Social Security Act, as amended, (42 U.S.C. Section 405(g)) to obtain judicial review of a final decision by respondent. It was docketed as Number C86-1336V.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked under 28 U.S.C. Section 1291 to review the final decision of the District Court and was docketed as Number C.A. 87-3994.

Petitioner is a Federal retiree with his retirement affairs administered by the Office of Personnel Management (OPM).

The first notification from any source that a material change had occurred in the amount and procedures of petitioner's annuity payments was on May 7, 1984, when

OPM, by letter, notified him of the enactment of Public Law 97-253, and the reduction in his retirement annuity. (Court Transcript of the Record pp 41-42)[1] Public Law 97-253 had been enacted on September 8, 1982, 21 months prior to OPM notification to petitioner. (Appendix F)

OPM's notification to petitioner was 15 months after his 62nd birthday.

Petitioner was 62 years of age on January 15, 1983.

Public Law 97-253 provided that Federal annuitants, such as petitioner, with military service after a certain date in 1956 would have their military service computed by a new method, crediting that service toward social security eligibility. If, after the recomputation, on his 62nd birthday the annuitant was eligible for social security retirement insurance benefits, the annuity would be reduced by the amount of social security benefit. The annuitant could then apply for social security benefits to offset the reduction (Appendix A)

The reduction in retirement annuity to be determined by the amount of social security benefit was mandated by the Congress in Public Law 97-253. It was not discretionary. An annuitant who wanted to maintain his level of retirement income was left with only a single

choice - file for social security retirement insurance benefits to be effective the month of his 62nd birthday.

The concluding paragraph of Public Law 97-253 states: "The Secretary of Health and Human Services shall furnish such information to the Office of Personnel Management as may be necessary to carry out the preceding provisions of this section." (Appendix F)

Thus, the law envisioned that when a retiree, such as petitioner, approached his 62nd birthday, OPM would request from Social Security information as to the annuitant's eligibility for retirement insurance benefits. If eligibility was established, this information together with the amount would be provided OPM and OPM would affect a reduction in the retiree's annuity by that amount. The retiree could then apply for social security benefits to offset the reduction in his annuity amount. (Appendix F)

Processing following this procedure was not accomplished. Without consulting Social Security, OPM by some mysterious method determined an amount by which petitioner's annuity was to be reduced. (Court Transcript of the Record pp 65-68, 72, 77)

District Court was apprised of both the procedure envisioned by the law and what actually occurred. (Opening Brief for Plaintiff, in the District Court, pp 4-6)

District Court was presented two questions:

> "Is there a private right amongst the agencies of the Executive Branch of the Federal Government to shield the culpable actions of one agency by another and thereby circumvent justice?"
>
> "Is plaintiff entitled to retroactive retirement insurance benefits as claimed?"
> (Opening Brief for Plaintiff in District Court, p 2)

District Court referred the case to a magistrate for report and recommendation. This report and recommendation contained a garbled perspective of fact and circumstance. As a consequence, petitioner filed a motion to the Court in objection. The objections cited were: The avoidance by magistrate of any reference to the first issue before the court (Federal Agency protectionism); the inclusion of irrelevant and immaterial information, the citation of inappropriate legal reference; and, a general lack of familiarity with the facts of record. Petitioner accompanied his motion with in-depth discussion, citations to the record and precedent setting case law.

District Court approved and adopted Magistrate's report and recommendation without apparent regard for petitioner's objections and affirmed the final decision of respondent.

On appeal, petitioner cited to 9th Circuit three issues:

> "Whether the Trial Court erred in remaining silent on the issue presented by plaintiff to wit: "Is there a private right amongst the agencies of the Executive Branch of the Federal Government to shield the culpabie actions of one agency by another and thereby circumvent justice?"
>
> "Whether reversible error occurred by Trial Court when rendering judgment through affirming the final determination of appellee knowing that the entire body of relevant and compelling evidence pertainint to the provisions of Public Law 97-253, the intent of Congress expressed through that law and the errors and omissions by the Office of Personnel Management had been excluded from the justice process?"
>
> "Whether KERR is entitled to social security old age insurance benefits for January 1983 through December 1984 in accordance with the intent of the Congress when they enacted Public Law 97-253 and as claimed by him."

Petitioner presented a case before 9th Circuit employing the doctrine of equitable estoppel and cited

flagrant instances of denial of due process and abuse of discretion throughout the administrative and legal processes. (Brief for Appellant, CA 9, pp 11-20; and, Reply Brief for Appellant, CA9, pp 5-6)

9th Circuit's Memorandum Decision is fraught with error. Appellate Court states: "... the facts are not in dispute and the pertinent law, when ferreted from the great mass of provisions, is clear and manifests the conclusion that KERR has not been overreached and that the Secretary's decision was correct." (Appendix C, p 2)

Relative to the facts, 9th Circuit says: "the facts are not in dispute." This is ambiguous. Respondent and the Courts have grossly distorted the "facts." For instance, 9th Circuit states: "The Secretary lacks authority to inject himself into whatever dispute KERR has with the Office of Personnel Management over the latter's calculation of KERR's annuity for post-military (sic) service. The two agencies are separate. Granted, the amount arrived at by OPM, based upon its calculation, affected KERR's old-age benefits. The calculation itself and the fixing of the amount was not a matter for the Secretary but solely for that other agency." (Appendix C, p 3)

The quote in the above paragraph represents nearly everything that petitioner has called "distortion," "agency bias," "abuse of discretion," and "denial of due process." First, petitioner is not in dispute over the calculation of his annuity for post-1956 military service - only the method of process. Once the method aspect is resolved, the amount will correct itself, if necessary. Second, there is no way, without referral to social security records, that OPM could calculate an accurate reduction in petitionr's annuity. OPM did not request this information from Social Security, although Public Law 97-253 required this information to be furnished to OPM by "The Secretary of Health and Human Services." (Appendix F) (Also refer to Opening Brief for Appellant, pp 4-6) Third, the amount arrived at by OPM, based on its calculations did not affect petitioner's old age retirement benefits. So far as is known, Social Security is not aware or interested in the amount of petitioner's retirement. Social Security calculated petitioner's retirement insurance benefits from records within its own agency, independent of input from any outside source. And last, 9th Circuit shows its lack of understanding the provisions of Public Law 97-253 and the intent of the Congress. Appeals Court continued: "The

calculation itself and the fixing of the amount was not a matter for the Secretary but solely for that other agency." (Appendix C) Not so. The law implicitly charged: "The Secretary, Health and Human Services shall furnish such information to the Office of Personnel Mangement as may be necessary to carry out the preceding provisions of this section." The only reason for this was to enable OPM to reduce a retiree's annuity by a like amount. Interestingly, the amount of annuity reduction by OPM in petitioner's case is not the same as the benefit awarded by SSA.

9th Circuit concludes its Memorandum Decision with the erroneous statement that Public Law 97-253 does not deal with Social Security retirement insurance benefits and that jurisdiction in annuities for military services are vested exclusively in OPM. Again, not so. The quote from the law in the preceding paragraph shows that the two agencies are inexorably joined to cooperate in carrying out the mandate of the Congress. OPM to determine when an annuitant approaches or attains his 62nd birthday, to provide this information to Social Security, Social Security to determine benefit eligibility and the amount and then provide OPM with this information. OPM then

would reduce the retiree's annuity by that amount. And, in this instance, this did not happen.

There was no reason other than the situation created by Public Law 97-253 for petitionr to have applied for social security retirement insurance benefits prior to his 65th birthday. The law provided that if an annuitant wanted to maintain the same level of retirement income, it was necessary to apply for retirement insurance benefits concurrent with the reduction in his Federal annuity.

On each administrative processing level, from initially filing for benefits through the Appeals Council, petitioner presented evidence of Public Law 97-253 together with OPM's and Social Security's failure to administer the law as was mandated by the Congress.

Not once, in response to petitioner's introduction of this evidence, did anyone in the Social Security Administration indicate they were aware of the existence of Public Law 97-253. The record is silent pertaining to this law, except where introduced by petitioner in the various proceedings. Attempts by petitioner to penetrate this wall of silence in conferences, hearings, appeals

including written and oral persuasion were without success.

District Court affirmed the action of the Secretary, Health and Human Services.

Ninth Circuit affirmed the findings of the lower court.

REASONS FOR GRANTING THE WRIT

Ninth Circuit (a) wrongfully suppressed relevant and material evidence when it sustained the lower court in remaining silent on the issue: "Is there a private right amongst the agencies of the Executive Branch of the Federal Government to shield the culpable actions of one agency by another and thereby circumvent justice?" which raises important unresolved questions; (b) denied petitioner of his due process rights; and (c) its decisions conflict with this Court and other Circuits.

The Appeals Council, in its ruling, stated: "The Council finds, however, that the contentions you raised are outside an area that can be ruled on by this agency. The law and regulations do not provide a basis for Social Security to cite another Federal Agency for its actions."

It is true there are no laws or regulations which address themselves to this particular set of circumstances. An agency, court or person does not need laws or regulations to recognize error or to distinguish right from wrong.

The Social Security Act, enacted prior to Public Law 97-253, envisions the ordinary and routine application for benefits. Even so, The Administrative Procedures Act (5 U.S.C. Section 556(d)) provides that an agency shall provide for exclusion of irrelevant, immaterial or unduly

repetitious evidence. Thus, by negative implication, an agency may not provide for exclusion of relevant evidence, as defined in FRE 401, if such evidence is not protected by privilege or countervailing policy. Catholic Medical Center v. NLRB, (1978 CA2) 589 F2d 1166. (See also Brief for Appellant, CA9, p 8)

When petitioner sought review in District Court, the Federal Rules of Evidence became governing factors. Rule 101 (Making the Federal Rules of Evidence Applicable in United States and Magistrates Courts); Rule 401 (Defining "relevant evidence"); and, Rule 402 (Concerning admissibility of relevant evidence) made it mandatory for the Courts to consider Public Law 97-253.

Excluded by District Court were the relevant facts concerning:

(1) The existence of Public Law 97-253.

(2) The will of the Congress which intended that when a Federal annuity was reduced in accordance with the law, the shortfall would be compensated through social security benefits upon application by the annuitant.

(3) The specific responsibilities tasked OPM and SSA by the law.

(4) The failure by OPM in a proper discharge of its responsibilities under the law.

This Court in Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568, 67 L.Ed. 408, 43 S.Crt 210, held that if the court finds substantial evidence relating to material facts not reported by a Federal Agency in a proceeding from which different conclusions may be drawn, the matter may, and ordinarily should, be remanded to the agency with directions to make additional findings; but, if from all the circumstances, the controversy should be decided without further delay, the court has the power to do so. (Brief for Appellant, CA 9, p 21)

Seventh Circuit in A. E. Stanley Manufacturing Co. v. Secretary of Agriculture, 120 F2d 258 (CA7), held that the court must remand to the administrative agency in a situation in which the court could not tell whether the Secretary had weighed the evidence and cast it aside in his discretion or did not consider it al all. (Brief for Appellant, CA9 p 21)

District Court abused its discretionary powers in remaining silent.

This Court has held that where a district court did not enter an order on the issue, the court of appeals, as a matter of mootness, should have the opportunity to

consider the mootness issue in the first instance and the case was remanded to the court of appeals for that purpose. Foley v. Blair and Co., N.Y. 1973, 94 S.Crt. 405, 414 U.S. 212, 38 LEd2d 422, mandate conformed to 495 F2d 299. (See also, Brief for Appellant, CA9, p10; and, Reply Brief for Appellant, CA9, p3)

The will of the Congress is stated unequivocally in the law. This Court has held it is the duty even of the United States Supreme Court to respect the will of Congress. Northwest Airlines v. Transport Union, 101 S.Crt. 1571, 1582, 1584 (1981) (See also Appellant Reply Brief, CA9, p5 and Appellant Petition for Rehearing and Suggestion for Rehearing En Banc, CA9, p3)

Petitioner's appeal to Ninth Circuit was premised partially on the doctrine of equitable estoppel. It was accepted by the Court as such.

Ninth Circuit in United States v. Ruby Co., 588 F2d 697 (CA9 1978) established the elements to be met in applying this doctrine. (Brief for Appellant, CA9, p12)

This Court in 99 S.Crt. 2838 upheld Ninth Circuit in this action. (Brief for Appellant, CA9, p13)

Also, this Court in Heckler v. Community Health Services of Crawford County, Inc., 104 S.Crt. 2218, held

that a party could claim estoppel when injustice might result. (Brief for Appellant, CA9, p11)

Petitioner presented incontrovertible facts, supportive legal citations and in-depth argument. (Brief for Appellant, CA9, pp 11-20; Reply Brief for Appellant, CA9, p5)

Ninth Circuit in its Memorandum Decision summarily dismissed the contention as being without merit.

There is a basic question of "right and wrong" that seems to have gone unanswered. The judiciary, although this is a primary function of rendering justice in this case, seems prone to avoid answering this question, and this of itself is wrong.

From the very beginning of petitioner's initial application for benefits through judgment and opinion of Ninth Circuit, no one seems to have paid any attention or given any weight to what he had to say. And, this is wrong.

This Court in Stone v. Bank of Commerce, 174 U.S. 412, 19 S. Crt. 747, concluded: "An equitable estoppel rests upon the doctrine that it will be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights.

In Daniels v. Tearney, 102 U.S. 415, the Court held: The principle of estoppel has its foundation in a wise and salutary policy. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it, society could not well go on."

The summary dismissal of issues which were supported by uncontested and uncontrovertible facts, law and legal precedent gives rise to important questions which demand answers that will correct the disarray and confused state in which the law has been left by the courts.

At the present moment it is as though Public Law 97-253 had never existed and that petitioner's application for social security benefits was no more compelling than a routinely submitted claim.

CONCLUSION

For these various reasons, petitioner prays this petition for writ of certiorari be granted.

Respectfully submitted,

November 28, 1988

CHARLES A. KERR II
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(206) 337-9424
Pro se

APPENDIX A

Department of Health & Human Services
Social Security Administration
Office of Hearings and Appeals
P. O. Box 3200
Arlington, Virginia 22203

Refer to: SGC - 28105-5271

January 10, 1986

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Charles A. Kerr II
10748 Caminito Bravura
San Diego, CA 92108

Dear Mr. Kerr:

The request for review of the Administrative Law Judge's decision in your case has been considered.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. (These provisions are contained in 20 CFR 404.970 for Social Security claims under Title II of the Social Security Act and in 20 CFR 416.1470 for supplemental security income claims under Title XVI of the Act.)

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case. In reaching this conclusion, the Appeals Council carefully considered each of the contentions raised by your letter dated November 9, 1985, as well as the additional material attached to your letter. The Council finds, however, that the contentions you raised are outside an area that can be ruled on by this Agency. The law and regulations do not provide a basis for Social Security to cite another Federal Agency for its actions. You were awarded retirement insurance benefits with the earliest possible month pursuant to Social Security regulations, and therefore, the Council finds no basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) for claims under Title II and in section 1631(c)(3) of the Act (42 U.S.C. 1383(c)(3)) for claims under Title XVI.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of

the Department of Health and Human Services at 200 Independence Avenue, S.W., Washington, D.C. 20201. (See Rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

/s/
Harriet A. Simon
Member, Appeals Council

cc: DO, San Diego, CA - Linda Vista
HO, San Diego, CA (ALJ Tom)

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHARLES A. KERR II,
Plaintiff,

vs.

OTIS R. BOWEN, SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant.

Case No. C86-1336V

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been and the jury has rendered its verdict.

XX Decision by Court. This action came to trial on hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the final determination of the Secretary is AFFIRMED.

May 20, 1987

BRUCE RIFKIN, Clerk

By /s/
Eileen Scollard
Deputy Clerk

APPENDIX B-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHARLES A. KERR II,
Plaintiff,

vs.

OTIS R. BOWEN, SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant.

Case No. C86-1336V

ORDER

Having considered the appeal of plaintiff from a final decision by defendant Secretary of Health and Human Services, together with the briefs filed by the parties, the report and recommendation of United States Magistrate Philip K. Sweigert, the objections of plaintiff to the Report and Recommendation, and the administrative record, the Court finds and rules as follows:

1. Plaintiff has appealed a final decision of the Secretary of Health and Human Services denying him Social Security benefits. This Court referred this matter to Magistrate Sweigert pursuant to Local Magistrates' Rule

MR(a)(4). Magistrate Sweigert recommends that the decision ofthe Secretary be affirmed. Plaintiff objects to this recommendation. This Court must make a de novo determination as to those portions of the recommendation to which plaintiff objects. MR 4(c).

2. In his objections, plaintiff asserts two arguments. First, it appears that plaintiff contends that the Secretary should compensate him in Social Security benefits for a wrong allegedly committed by the Office of Personnel Management in calculating payments on an annuity owned by plaintiff. Magistrate Sweigert correctly concluded that the Secretary has no such obligation.

3. Second, plaintiff contends that he was deprived of a fair hearing before an Administrative Law Judge ("ALJ") with regard to his claim for Social Security benefits. A review of the record reveals that plaintiff was given an opportunity to present his case before an ALJ. The ALJ accepted all of the exhibits offered by plaintiff and afforded plaintiff an opportunity to orally present his claim. Plaintiff does not make any specific reference to an instance of prejudice of the hearing beffore the ALJ or in any part of the benefit application process. In consequence, Magistrate Sweigert correctly

concluded that plaintiff had made no showing of a due process violation. See, Kelley v. Heckler, 761 F.2d 1538 (11th Cir. 1985).

Accordingly, the report and recommendation of Magistrate Sweigert is APPROVED and ADOPTED. The final determination of the Secretary is AFFIRMED.

The Clerk of this Court is directed to prepare judgment to reflect this ruling of the Court.

The Clerk of this Court is instructed to send uncertified copies of this order to Magistrate Sweigert, to plaintiff, and to all counsel of record.

DATED this 20th day of May, 1987.

/s/
Donald S. Voorhees
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES A. KERR II,
Plaintiff-Appellant,

vs.

OTIS R. BOWEN, SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

C.A. NO. 87-3994
D. C. No. C86-1336V

MEMORANDUM*

On Appeal from the United States District Court
for the Western District of Washington
Donald S. Voorhees, District Judge, Presiding

Submitted June 22, 1988**

Before: KOELSCH, KILKENNY, and FARRIS, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

We have here the not unusual case of a pro per litigant whose supposed grievance results from the lack of expertise in a particular phase of a Social Security program.

Charles A. Kerr II, the appellant, contends (erroneously) that the Secretary has "short changed" him with respect to old age insurance benefits. Such confusion is perhaps understandable when one studies the many statutes and regulations dealing with the subject. They are detailed, lengthy and cross-referenced to a degree which renders singling out those pertinent laws nearly impossible, even for one well versed in such matters.

In this instance, the facts are not in dispute and the pertinent law, when ferreted from the great mass of provisions, is clear and manifests the conclusion that Kerr has not been overreached and that the Secretary's decision was correct.

So far as need be noticed, it appears that Kerr, although he had not arrived at the retirement age of 65 years (42 U.S.C. Section 416(l) (1)(A)), when he applied for old age retirement insurance benefits on January 3, 1985, nevertheless had become eligible for retirement benefits

nearly three years earlier at age 62. 42 U.S.C. Sections 402 (a)2) & (3)(B).

Had Kerr applied for benefits immediately upon becoming eligible, his monthly benefits would have been smaller than those he has received under his later application. 42 U.S.C. Section 402(q)(1) & (6). The reason is this: the purpose of the retirement program is to insure that a covered individual receives substantially the same total sum in benefits over the remainder of his life whether he makes a claim immediately upon reaching the early age of eligibility or at a later time. See S. Rep. No. 425, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code cong. & Admin. News 1855, 1856. Thus, one who applies for benefits commencing on a date prior to age 65, is not entitled to the same monthly amount as if he had waited until the later date. The monthly amount is calculated on the basis of the application's timing in relation to the applicant's true retirement age of 65. In case of "early" applications the Secretary makes the appropriate reduction in the amount. In the "long run" the total sum received by an applicant will be approximately the same regardless of his timing; he will "lose" nothing. Nor does the amount of the monthly benefits fluctuate once it is

fixed. It remains the same as of the date of the application and the application does not operate retroactively. 42 U.S.C. Section 402(j)(4)(A).

None of Kerr's remaining contentions has merit and of them but two warrant more than brief mention.

The Secretary lacks authority to inject himself into whatever dispute Kerr has with the Office of Personnel Management over the latter's calculation of Kerr's annuity for post-military service. The two agencies are separate. Granted, the amount arrived at by OPM, based upon its calculations, affected Kerr's old-age retirement benefits. The calculation itself and the fixing of the amount was not a matter for the Secretary but solely for that other agency.

Public Law 97-253 does not deal with Social Security retirement insurance benefits--in pertinent part it relates to annuities for military service and vests jurisdiction in such matters exclusively in the Office of Personnel Management.

AFFIRMED.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES A. KERR II,
Plaintiff-Appellant,

vs.

OTIS R. BOWEN, SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

C.A. NO. 87-3994
D. C. No. C86-1336V

ORDER

Before: KOELSCH, KILKENNY, and FARRIS, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris voted to reject the suggestion for rehearing in banc, and Judges Koelsch and Kilkenny so recommended.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES A. KERR II,
Plaintiff-Appellant,

vs.

OTIS R. BOWEN, SECRETARY OF THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

C.A. NO. 87-3994
D. C. No. C86-1336V

JUDGMENT

Appeal from the United States District Court for the _____ District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered 7/21/88

A true copy attest: Sep 16 1988, CATHY A. BATTERSON, Clerk of the Court by _____, Deputy Clerk. This certification constitutes the mandate of the Court.

APPENDIX F

PUBLIC LAW 97-253--Sept. 8, 1982
(96 STAT. 797)

RECOMPUTATION AT AGE 62 OF CREDIT FOR MILITARY SERVICE OF CURRENT ANNUITANTS

Sec. 307(a) The provisions of section 8332(j) of title 5, United States Code, relating to credit for military service, shall not apply with respect to any individual who is entitled to an annuity under subchapter III of chapter 83 of title 5, United States Code, on or before the date of enactment of this Act.

(b) Subject to subsection (b), in any case in which an individual described in subsection (a) is also entitled to old-age insurance benefits under section 202(a) of the Social Security Act (or would be entitled to such benefits upon filing application therefor), the amount of the annuity to which such individual is entitled under subchapter III of chapter 5, United States Code, (after taking into account subsection (a)) which is payable for any month shall be reduced by an amount determined by multiplying the amount of such old-age insurance benefit for the determination month by a fraction --

(1) the numerator of which is the total of the wages (within the meaning of section 209 of the Social Security Act) for service referred to in section 210(l) of such act (relating to service in the uniformed services and deemed additional wages (within the meaning of section 229 of such Act) of such individual credited for years after 1956 and before the calendar year in which the determination month occurs, up to the contribution and benefit base determined under section 230 of the Social Security Act (or other applicable maximum annual amount referred to in section 215(e)(1) of such Act) for each such year, and

(2) the denominator of which is the total of all wages and deemed additional wages described in paragraph (1) of this subsection plus all other wages (within the meaning of section 209 of such Act) and all self-employment income (within the meaning of section 211(b) of such Act) of such individual credited for years after 1936 and before the calendar year in which the determination month occurs, up to the contribution and benefit base (or

such other amount referred to in such section 215(e)(1) for each such year.

(c) Subsection (b) shall not reduce the annuity of any individual below the amount of the annuity which would be payable under this subchapter to the individual for the determination month if section 8332(j) of title 5, United States Code, applied to the individual for such month.

(d) For purposes of this section, the term "determination month" means--

(1) the first month the individual described in subsection (a) is entitled to old-age insurance benefits under section 202(a) of the Social Security Act (or would be entitled to such benefits upon filing application therefor); or

(2) October 1982, in the case of any individual so entitled to such benefits for such month.

(e) The preceding provisions of this section shall take effect with respect to any annuity payment payable under subchapter III of chapter 83 of title 5, United States Code, for calendar months beginning after September 30, 1982.

(f) The Secretary of Health and Human Services shall furnish such information to the Office of Personnel Management as may be necessary to carry out the preceding provisions of this section.